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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

LEONARD W. BORISOFF,

Plaintiff and Appellant,

v.

THE PULLMAN GROUP, LLC, et al.,

Defendants and Respondents.

B259675

(Los Angeles County
Super. Ct. No. BC454901)

APPEAL from an order of the Superior Court of Los Angeles County, Mark Mooney. Reversed.

Chris Campbell for Plaintiff and Appellant.

Klapach & Klapach, Joseph L. Klapach for Defendants and Respondents.

Leonard W. Borisoff a successful songwriter, assigned his royalty rights and his claims against a third party to The Pullman Group, LLC, Wertheim, LLC, Structured Asset Sales, LLC, and David Pullman (collectively Pullman) by way of a purchase agreement that contained an arbitration clause. Borisoff later sued Pullman, which in turn filed a motion to compel arbitration. The trial court granted the motion without having determined a valid arbitration agreement existed, leaving that task to the arbitrators. The arbitrators returned an award for Pullman in the amount of \$41,000 plus \$67,866.13 in attorney fees. Pullman moved to confirm the award, which the trial court granted, again deferring to the arbitrators for the determination whether a valid arbitration agreement exists. Borisoff appeals from the resulting judgment.

We conclude that before a matter may be sent to arbitration, a trial court must in the first instance determine whether a valid arbitration agreement exists. That task cannot be left to the arbitrators. In any event, the award here cannot be confirmed. Accordingly, we reverse.

BACKGROUND

Borisoff was a successful vocalist, songwriter and producer in the 1960's who as a result of his work owned rights to royalty income of up to \$30,000 per year, payable by such companies as Broadcast Music, Inc., Universal Music Publishing, Minder Music, and SoundExchange (collectively BMI). Borisoff used this royalty stream to obtain loans from Currency Corp., a finance lender. When a conflict arose between Borisoff and Currency over Currency's interest rates and accounting practices, Borisoff assigned both his assignable and nonassignable claims against Currency, as well as his music library, to Pullman.

A. Assignment Agreement

The assignment agreement, which Pullman drafted, is set forth in 13 visually and verbally dense single-spaced pages with small typeface and relatively few paragraph breaks. It provided that Pullman would pay Borisoff \$100,000 (later amended to \$50,000) for his music library and all related claims and "rights," less "costs."

1. “Costs”

The agreement defined “costs” as “including, but not limited to, the cost [of setting up an LLC (which Pullman would own) to acquire Borisoff’s royalty rights], the costs to secure recognition of the transfer of the Rights to Pullman by Broadcast Music, Inc. (“BMI”), Universal Music Publishing, Sounds of Universal, Inc., and any Universal related entity, (“Universal”), Minder Music Publishing and any related entity (“Minder”), MCA, and any MCA related entity, Universal Records and any Universal related entity (“Universal Records”) and SoundExchange, Inc. and any related entity (“SoundExchange”), EMI UNART Catalogue, Inc., EMI Group, EMI Music Publishing and any EMI related [*sic*] and any and all record labels, record companies, music companies, worldwide distributors (“Record Companies”), and all Administrators, Societies, and Publishers worldwide, and the costs of any necessary lien searches.” Also to be deducted was the cost of “any liens, claims, encumbrances, judgments or advances . . . [and] any amounts withheld by Pullman to pay and discharge any or all of the liens.”

The assignment agreement provided that Pullman would also effectively subtract from the purchase price any funds that “Pullman at its sole discretion, shall designate [as] consulting fees paid to Owner pursuant to a separate Consulting Fee Agreement.” Under this provision, if Pullman felt “at its sole discretion” that it owed Borisoff \$10,000 in consulting fees under a separate consulting agreement, for example, it could dedicate \$10,000 of the purchase price as payment of those fees, effectively subtracting that amount from whatever might be due under assignment agreement.

An addition to \$100,000 (later \$50,000), Pullman would pay Borisoff any royalties earned over \$50,000 in 2008, \$55,000 in 2009, \$60,000 in 2010, et cetera, but if the amount earned equaled less than these amounts, any deficit would carry over to the next and all following years. For example, if only \$30,000 were earned in 2008, Borisoff would receive in 2009 only those royalties earned in excess of \$75,000.

Borisoff would be paid when he “met all conditions and requirements” stated in the agreement, which effectively meant after “Pullman has received a . . . written acknowledgement from [each of the entities listed above] of their acceptance of the

transfer of the Rights to Pullman,” although Pullman reserved the right “at its solo option” to “withhold sufficient funds deducted from the Purchase Price to discharge the claims of any lien claimant.”

In addition to a monetary payment based on royalties, Pullman offered to pay Borisoff 50 percent of any proceeds from litigation of Borisoff’s non-assignable claims against Currency.

The financial aspect of the assignment’s consideration was patently illusory, because in the unlikely event that some portion of the purchase price remained after payment of global “costs,” Pullman could at its discretion designate that portion as satisfaction of a separate consulting agreement. And because it is undisputed Borisoff’s royalty stream does not exceed \$50,000 per year, he would be entitled to no residual payments in 2008 and following.

2. “Rights”

The “rights” Borisoff ceded to Pullman included any claims against Currency, including “assignable claims and non-assignable claims . . . without limitation, including the right of filing litigation of the assignable and non-assignable claims, the right to settle, the right to control and receive the proceeds of any and all awards and or settlement or compromise from any and all claims whether assignable or non-assignable.” The agreement provided that “[a]ll proceeds from any non-assignable claims are directed to be paid to Pullman and to be under control of Pullman as well as first right of refusal and matching right in and to [Borisoff’s] economic interest in the proceeds of any assignable and nonassignable claims. Pullman shall have sole control and authority to settle or compromise or litigate any of the assignable and non-assignable claims and [Borisoff] grants David Pullman an irrevocable power of attorney with regard to the assignable and non-assignable claims.” Borisoff had no “right or authority to settle or in any way compromise the non-assignable claims (including the assigned proceeds relating thereto) without the prior written consent of Pullman. Any such action by [Borisoff] to compromise the non-assignable claims in any way shall be deemed null and void.

Pullman and [Borisoff] shall share all proceeds of the Currency Corp. Parties non-assignable claims proceeds equally on a 50/50 basis”

We examined these identical provisions in two appeals in other cases, where we concluded they were void because they purported to authorize Pullman to practice law without a license, commercialized the practice of law, and violated public policy by granting David Pullman power to veto settlement in any litigation against Currency. However, we deemed the provisions to be severable from the remainder of the contract because they were collateral to the contract’s central purpose. (*Wertheim v. Currency Corp.* (May 22, 2012, B218547 [nonpub. opn.]; *Wertheim v. Omidvar* (Oct. 5, 2011, B218021 [nonpub. opn.]).) We observed in dicta in a third appeal that the assignment agreement as a whole was unconscionable because it was written in visually dense, incomprehensible language, heavily favored its author, and was obtained under conditions of undue influence. (*Currency Corp. v. Wertheim* (Sept. 30, 2013, B240444 [nonpub. opn.]).)

3. Arbitration Provision

The assignment agreement provided that any dispute arising from it would be settled by arbitration before a panel of three non-attorney arbitrators in accordance with the rules of the American Arbitration Association, the arbitration to occur within 60 days of the filing of the demand for arbitration and be completed in one day.

B. Litigation

By 2011, Pullman had paid Borisoff only an advance of \$4,000, yet had collected all royalties. Borisoff then filed this lawsuit, seeking declaratory relief and rescission on the grounds of fraud and failure of consideration. (The complaint is not included in the record on appeal.)

Pullman responded by moving to compel arbitration, which the trial court granted on July 8, 2011, ordering a one-day arbitration to occur within 60 days.

On April 17, 2012, an arbitration panel preliminarily ruled the assignment agreement was valid and had not been rescinded or terminated.¹

The arbitration panel heard evidence on June 7, 2013, after which it “order[ed] specific performance under the” assignment agreement and declared that “[a]ny and all agreements between the Parties and all contracts, all contract rights, powers of attorney, assignments, transfers, audit rights and any and all other rights related to the Agreement . . . and assignments are valid, legally binding, enforceable, and in full force and effect.” Pullman was ordered to “share with Borisoff the proceeds, if any, as a result of any litigation by Pullman as provided by and calculated according to the Agreement” and to pay Borisoff the \$50,000 assignment price (less \$4,000 already paid) and a \$5,000 “due diligence” setoff. The panel also awarded Pullman attorney fees in the amount of \$67,866.13, the net result being that Borisoff was ordered to pay Pullman \$26,886.13. Pullman was granted all royalty payments made since January 1, 2007 and all future royalties.

Pullman moved to confirm the arbitration award and Borisoff moved to vacate it, arguing the assignment agreement was illegal, the arbitration panel failed to disclose conflicts, and there were improprieties in the conduct of the arbitration.

The trial court confirmed the award without determining the validity of the assignment agreement or its arbitration provision, finding the arbitrators had already “determined that a valid contract existed between the parties.” Although the court observed that “only those provisions dealing with assignment of non-assignable claims and unlawful practice of law would be considered void,” its subsequent judgment failed

¹ It is unclear whether Borisoff has rescinded the assignment agreement. Although he alleged rescission in his complaint, that complaint is not part of the record on appeal. The panel found “Borisoff attempted to rescind the Agreement” but was unsuccessful because he had no “adequate grounds” to do so unilaterally. But inadequate grounds to rescind does not prevent rescission, it merely makes certain remedies and defenses unavailable to the rescinding party. (See *Little v. Pullman* (2013) 219 Cal.App.4th 558, 568 [“Rescission extinguishes a contract and may be accomplished unilaterally by a party”].)

to incorporate that restriction. Instead, the judgment, like the award, provided that “[a]ny and all agreements between the Parties and all contracts, all contract rights, powers of attorney, assignments, transfers, audit rights and any and all other rights related to the Agreement . . . are valid, legally binding, enforceable, and in full force and effect,” and Pullman was to share with Borisoff “the proceeds, if any, as a result of any litigation by Pullman as provided and calculated according to the Agreement.”

Borisoff appealed from the judgment.

DISCUSSION

We review de novo a trial court’s legal conclusions in an order confirming an arbitration award. (*Greenspan v. LADT, LLC* (2010) 185 Cal.App.4th 1413, 1435.) To the extent the trial court’s decision is based upon resolution of disputed facts, we review the decision for substantial evidence. (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

Borisoff contends the arbitration award should be vacated because (1) the agreement it purports to enforce is illegal, (2) no judicial determination has been made that an agreement to arbitrate exists, (3) the arbitration panel failed to disclose a conflict of interest, and (4) the panel exceeded its authority in several respects. We agree with Borisoff’s first and second contentions and need not reach the others.

I. The Requirement of an Arbitration Agreement

“Private arbitration (also called contractual or nonjudicial arbitration) ‘is a procedure for resolving disputes which arises from contract; it only comes into play when the parties to the dispute have agreed to submit to it.’” (*Toal v. Tardif* (2009) 178 Cal.App.4th 1208, 1218.) “By agreeing to arbitration, parties anticipate a relatively speedy, inexpensive and final resolution, one that may be based on “‘broad principles of justice,’” rather than strictly the rule of law. [Citation.] Consequently, ‘as a general rule courts will indulge every reasonable intendment to give effect to arbitration proceedings.’” (*Ibid.*) But “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” (*Atkinson v. Sinclair Refining Co.* (1962) 370 U.S. 238, 241.) The “question of whether the parties agreed to arbitrate is to be

decided by the court, not the arbitrator.” (*AT&T Technologies, Inc. v. Communications Workers of America* (1986) 475 U.S. 643, 649.)

An arbitration award “has the same force and effect as a contract in writing between the parties to the arbitration.” (Code Civ. Proc., § 1287.6.) A party may seek judicial enforcement of the award by petitioning the court to confirm it. (Code Civ. Proc., § 1285.) A petition to confirm an award is akin to a suit in equity seeking specific performance of the arbitration contract. (See *Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653 [a petition to compel arbitration is a suit in equity seeking specific performance of an arbitration agreement].)

The “existence of the agreement is a statutory prerequisite to granting the petition . . .” (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) Before a court may confirm an arbitration award it must find, or there must have been a prior judicial finding, that a valid arbitration agreement exists. (*Toal v. Tardif, supra*, 178 Cal.App.4th at p. 1221.) “[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable. . . . If the party opposing the petition raises a defense to enforcement—either fraud in the execution voiding the agreement, or a statutory defense of waiver or revocation [citation]—that party bears the burden of producing evidence of, and proving by a preponderance of the evidence, any fact necessary to the defense.” (*Rosenthal, supra*, 14 Cal.4th at p. 413.)

Because the trial court here deferred the question of arbitrability to the arbitrators, no court has yet determined that a valid agreement to arbitrate exists. Absent such a finding, the court had no authority to confirm the award.

Pullman argues the Federal Arbitration Act, which controls here, holds that the validity of an arbitration agreement is to be determined by the arbitrator in the first instance. The argument is without merit.

The Federal Arbitration Act imposes “two distinct presumptions, depending on the subject matter. ‘On the one hand, courts presume that the parties intend courts, not

arbitrators, to decide . . . disputes about “arbitrability,” e.g., whether there is an enforceable arbitration agreement or whether it applies to the dispute at hand. [Citations.] ‘On the other hand, courts presume that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration.’ [Citations.] [¶] These presumptions make sense; unless the parties specify otherwise, one would assume they should not be required to submit to an arbitrator the questions whether they have agreed to submit to an arbitration at all or arbitrate a given dispute. After all, because “[a]rbitration is strictly “a matter of consent”” [citations], “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit” [citations].” (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 251-252.) Therefore, we may not “presume arbitrability without first establishing, independently, consent to arbitration” (*Id.* at p. 252.)

Relying on *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 444 [126 S.Ct. 120, 163 L.Ed.2d 1038] (*Buckeye*), Pullman argues a different rule applies where the party resisting arbitration challenges the validity of a contract as a whole, as opposed to challenging only the contract’s arbitration provision. The argument is meritless. *Buckeye* held that “an arbitration provision is severable from the remainder of the contract,” and “unless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.” (*Id.* at pp. 445-446.) But a challenge to the validity of the entire contract may subsume a challenge to its arbitration provision. If it does, that challenge must be resolved by a court in the first instance. (*Sandquist v. Lebo Automotive, Inc., supra*, at p. 252.)

In any event, Pullman’s point is immaterial because Borisoff challenges not only the assignment agreement globally but also the arbitration provision specifically, which Borisoff implicitly argues is procedurally and substantively unconscionable.

Because the trial court abrogated its responsibility to determine an arbitration agreement existed before confirming the arbitration award, we would normally remand

the matter for further proceedings. We need not do so here, however, because the award cannot be confirmed in any event.

II. Enforcement of the Award Would Violate the Law and Contravene Public Policy

As we held in *Wertheim v. Currency Corp.* and *Wertheim v. Omidvar*, the assignment provisions granting Pullman rights to non-assignable claims against Currency, including the right to file, control, and receive proceeds from litigation and to settle the claims or veto settlement, are void because they commercialize the practice of law, purport to authorize Pullman to practice law without a license, and violate public policy. The parties are referred to those decisions for a more complete discussion of the matter; we need not belabor the point here because Pullman does not dispute it.

Instead, Pullman argues the United States Supreme Court determined in *Buckeye* that under the Federal Arbitration Act, a trial court is bound by an arbitrator's determination whether a contract containing an arbitration provision is illegal. The argument is without merit.

Buckeye held that under the Federal Arbitration Act, a motion to compel arbitration may not be denied on the ground that contractual provisions (other than the arbitration clause itself) are illegal, as the issue of illegality is to be determined by the arbitrator, not the court. *Buckeye* did not hold a trial court must enforce an arbitration award that depends on, incorporates, or purports to effect an illegal contract.

On that point the law is clearly to the contrary: Courts will not enforce arbitration awards rendered pursuant to illegal contracts. (*Joe A. Freitas & Sons v. Food Packers Etc. & Warehousemen* (1985) 164 Cal.App.3d 1210, 1219; *American & Nat. Etc. Baseball Clubs v. Major League Baseball Players Assn.* (1976) 59 Cal.App.3d 493, 498.) The "rules which give finality to the arbitrator's determination of ordinary questions of fact or of law are inapplicable where the issue of illegality of the entire transaction is raised in a proceeding for the enforcement of the arbitrator's award. When so raised, the issue is one for judicial determination upon the evidence presented to the trial court, and any preliminary determination of legality by the arbitrator, whether in the nature of a

determination of a pure question of law or a mixed question of fact and law, should not be held to be binding upon the trial court.” (*Loving & Evans v. Blick* (1949) 33 Cal.2d 603, 609.)

Here, the arbitration award presumes to obligate the trial court to participate, by way of confirmation and enforcement, in a violation of public policy. This it may not do. Although the court, apparently cognizant of this limitation, observed that non-void provisions of the assignment agreement need not be enforced, that proviso never made it into the order confirming the award, nor into the judgment. Nor could it, as the arbitrators made no distinction between void and non-void provisions in rendering their award, and the trial court had no authority or ability to guess what would have resulted had they done so. Therefore, no part of the award may be confirmed.

In a footnote, Pullman cites a Connecticut Supreme Court case and an unpublished case from the District of New Jersey for the proposition that *Buckeye* applies not only with respect to a motion to compel arbitration but also to post-arbitration enforcement of an award. The cases do not stand for that proposition. The Connecticut Supreme Court held only that “if a party, either explicitly or implicitly by its conduct, waives the defense of illegality before the arbitration panel, that party is precluded from raising it in subsequent judicial proceedings to confirm or to vacate an arbitration award by characterizing it as a claim that the arbitration award violates public policy.” (*C.R. Klewin Northeast, LLC v. City of Bridgeport* (2007) 282 Conn. 54, 64.) But this is so not because the reviewing court lacks jurisdiction over such a claim, but “because the waiver of that claim before the arbitration panel deprives the reviewing court of the factual predicate for the public policy challenge.” (*Ibid.*) The District Court for the District of New Jersey said nothing about *Buckeye*’s application in the award confirmation context, but observed, contrary to Pullman’s position, that a court reviewing an arbitration award has jurisdiction to determine whether the contract upon which the award is based was obtained through fraud. (Cf. *Doug Brady, Inc. v. N.J. Bldg. Laborers Statewide Funds* (D.N.J. Feb. 11, 2009) 2009 U.S. Dist. Lexis 10280.)

Because the arbitration award here orders the parties to violate public policy, it cannot be confirmed.

DISPOSITION

The judgment is reversed. Borisoff is to recover his costs on appeal.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

WE CONCUR:

JOHNSON, J.

LUI, J.